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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1951.

No. 629.

UNITED STATES OF AMERICA,
Plaintiff-Respondent,

v.

TISHMAN REALTY & CONSTRUCTION COMPANY, INC.,
Defendant-Petitioner,

and

49,375 SQUARE FEET, MORE OR LESS, IN THE BOROUGH OF MANHATTAN, CITY AND STATE OF NEW YORK, and METROPOLITAN LIFE INSURANCE COMPANY, CITY OF NEW YORK, PEOPLE OF THE STATE OF NEW YORK,

Defendants.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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49,375 SQUARE FEET, MORE OR LESS, IN THE BOROUGH OF MANHATTAN, CITY AND STATE OF NEW YORK, and METROPOLITAN LIFE INSURANCE COMPANY, CITY OF NEW YORK, PEOPLE OF THE STATE OF NEW YORK,

Defendants.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

Defendant-Petitioner Tishman Realty & Construction Company, Inc., respectfully prays the issuance of a writ of certiorari to the United States Court of Appeals for the Second Circuit to review a judgment and decision of that Court which affirmed on opinion below a judgment entered by the United States District Court for the Southern District of New York on July 27, 1950, fixing $3,090,000 as the compensation to be paid for the taking of petitioner's property under eminent domain (pp. 646-8).

JURISDICTION.

The judgment of the Court of Appeals was entered on January 2, 1952. The jurisdiction of this Court is invoked under Sections 1254 (1) and 2101 (c) of Title 28, United States Code.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Petitioner's property—a sixteen-story office and loft building occupying a blockfront 250 x 200 feet on Seventh Avenue, New York City—was condemned under the Declaration of Taking Act (40 U. S. C. §§258a, *et seq.*) for use by the Veterans Administration as a Regional Office (p. 12).

The judgment rendered below awarded only 3% more than the Government's estimated value ($3,000,000, p. 13), though the claimant had refused $3,500,000 offered by a third party for the property six months before it was taken (pp. 616-9 and stipulation, pp. 598-9).

The decision below was based on a novel and erroneous ruling of law: In valuing this income-producing business property, the Trial Judge refused to give *any* consideration to capitalization of earnings—"my valuation of the building is not at all on an income basis" (p. 513)—holding that it was precluded from doing so by reason of the New York emergency rent laws (pp. 506-7).

It is undisputed that under the New York emergency rent laws, during the period of the statutory

emergency*, a landlord may not collect rent exceeding a defined "emergency rent" unless he obtains a higher "reasonable rent based on the fair rental value" by legal proceedings, by arbitration or by agreement of the tenant. Despite these methods provided by State law for fixing and obtaining a fair rental value, the Trial Judge held that the State statute prevented him from finding or considering fair rental value in a Federal condemnation proceeding.

Having thus refused to utilize the income approach, the Court considered itself relegated to a last-resort arithmetical formula that was incapable of yielding just compensation:

> "there is nothing left but to *attempt*** to value the building on a unit basis, taking into consideration *for what they are worth* the recent sales of property somewhere nearly equivalent to the subject premises. Of these, the government seems to concede there are only four * * *" (Opinion, p. 509).

As a matter of law, the four sales so relied on were not capable of establishing value. One was a transfer between two companies owned by the same man, another was a sale to a tenant holding a lease disadvantageous to the owner, and a third was under compulsion of law. Thus only one was a sale at arms' length between willing parties, and even that admittedly involved a dissimilar building in a different neighborhood (*post*, pp. 14-15).

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* Since 1945, the emergency has been redeclared each year *for a period of one year* by the State Legislature.

** Italics ours throughout.

Four such "sales" do not afford "any assurance that the prices paid would have been repeated in the sale we postulate of the property taken" (*United States* v. *Toronto, etc. Navigation Co.*, 338 U. S. 396, 402). Hence on a record like this, "recourse must be had to other means of ascertaining value, including even value to the owner * * *" (*Kimball Laundry Co.* v. *United States*, 338 U. S. 1, 6).

Here the award was $410,000 less than the price refused by the owner.

The uncontradicted proof showed that the building alone could not be reproduced for less than $7,500,000 (p. 31).

Admittedly the building would command rents proved by the owner—"you have rents of $1.25, $1.50 and $1.75. Now that is true, they were that much" (p. 209)—and such rents, as the Trial Judge said, showed "that on the capitalization basis this building is worth $5,000,000" (p. 344).

In the face of these facts, it was wholly indefensible to make an award of $3,090,000 on the sole basis of four "sales" such as those relied on below.

The complete disregard of the income approach is the basis of this petition. The Trial Judge accepted the Government's contention that capitalization, ordinarily the prime factor in valuing income property, was rendered "unreliable" in 1947 because of the State rent control act (pp. 209-10, 257-8, 506-7).

We maintained below and here urge that the existence of a rent control law is merely another fact in

the valuation complex, not an excuse for violating the principles of just compensation.

Beyond this, it was shown by the testimony of leading bank and insurance officials that responsible lending institutions in New York gave prime weight to capitalization during the existence of the rent control law (*post*, p. 18).

Though the courts below refused to consider the income approach, such was not the Government's position. Capitalization of estimated net income was used by the Government in support of the so-called "comparative sales". But the Government in so using the income approach gave no heed to admitted earning power: it took as its "earnings" base a net income derived from the New York "emergency rent", and the Trial Court, though rejecting the method (p. 507), adopted the end result.*

To accept a result so arrived at violates every concept of due process. A result must be tested by the means used to achieve it. This result does not survive that test. The "emergency rent", as the court below recognized, was not a proper basis of valuation in 1947, when the property was taken. It was a purely arbitrary amount, *viz.*: the rent of March 1, 1943 plus 15% (L. 1945, ch. 3, §2(e); Uncons. L. [65 McKinney's Cons. L., part 2], §8522e). Beyond this, the state law in terms contained mandatory relief against the rigors of the "emergency rent" formula. A "reasonable rent based on the fair rental value"

* "It is my finding that at the time of the taking the market value of claimant's building, as such, was certainly not more than $3.50 per square foot, *the value for which the government contends*" (Opinion, p. 513).

and "exceeding the emergency rent" could be fixed by agreement, by arbitration or by application to the New York Supreme Court (ibid., §8524). These provisions had saved the constitutionality of the rent control statute under state law (*Twentieth Century Associates* v. *Waldman,* 294 N. Y. 571, 581).

Thus there is ample reason for this cause to be heard, since the owner of property taken *in invitum* has here had his compensation measured not by its conceded earning power or any finding of its fair rental value, but by four worthless sales and a rental of 52½¢ per square foot—the "emergency rent" paid by "people who were willing to sit tight and take advantage of the rent laws" (Shlichta, for the Government, at p. 209).

Questions Presented.

1. Is a federal court in eminent domain justified by the existence of a state emergency rent control law in refusing to give any consideration to the income approach and basing its award on sales alone, where the few "sales" relied on could not, as a matter of law, establish the market value of the condemned premises?

2. Under such circumstances, may a federal court *because* of the emergency rent law refuse to do what the state court would be obliged to do *under* the emergency rent law (*i. e.*: determine the fair rental value of the subject premises), where such a determination is material to the admeasurement of fee value and no other legally adequate method of admeasurement was found?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

Petitioner relies on Rule XXXVIII (5)(b) in so far as it indicates that the Court will consider an application for a writ where a Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

We find no case in which the Court has considered the effect that should be given a state emergency rent control law in a federal proceeding for the condemnation of real property.

United States v. *Commodities Trading Corp.*, 339 U. S. 121, referred to by the Trial Judge on oral argument (pp. 603 *et passim*), did not answer the question here presented. There, five justices held that the owner of pepper taken during the war for Government use must needs remain satisfied upon receiving the OPA ceiling price, since that represented the highest market price obtainable under federal law.

The difference here is apparent. This was a state, not a federal regulation. It did not limit or control the price at which the owner could sell, but only the rent he could charge. Further, though the state law contained a rent ceiling, it also contained judicial and arbitrational machinery for fixing reasonable rentals in disregard of the ceiling.

Absent any possibility of deriving a market value from sales of similar property, the Trial Court here refused to perform the duty enjoined by the very state law it relied on as the excuse for non-performance. The state law directs the state courts to find

fair rental values notwithstanding the emergency. The state courts have stressed the constitutional importance of this mandate (*Twentieth Century Associates* v. *Waldman*, 294 N. Y. 571, 581), and obeyed it in countless proceedings brought thereunder (see, *e. g.*, cases tabulated at p. 612). But here a federal court, faced with the duty of making just compensation in eminent domain, has elected to rely on admittedly worthless evidence, pleading that because of the emergency rent law it could not find the fair rental value and thus admeasure fee value on a rational basis.

In the words of Mr. Justice Cardozo, "A *non possumus* so feeble has no warrant in the statute." (*Matter of Kaufmann*, 245 N. Y. 423, 429.)

If this be judicially permissible, then the owner of property taken by the Federal Government can not hope to receive rational treatment if his property lies in a state that controls rents, unless he can perchance establish market value by sales of similar property.

Hence, and for the further reasons given in the brief subjoined, the existence of a question deserving of review is respectfully suggested.

Prayer.

Petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit commanding said court to certify and send to this Court a transcript of the record in this cause, to the end that the same may be here reviewed and de-

termined; that the judgment and decision of said Court of Appeals be reversed and a new trial ordered; and that petitioner have such other relief as may be proper.

Dated: New York, N. Y., February 15, 1952.

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Defendants.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The opinion of the District Court (Kennedy, *Dt. J.*) is reported in 92 Fed. Supp. 384. The *per curiam* opinion of the Court of Appeals for the Second Circuit (Swan, L. Hand and A. N. Hand, *Ct. JJ.*) is not yet reported.

Jurisdiction.

The judgment of the Court of Appeals was entered on January 2, 1952. The jurisdiction of this Court is

invoked under Sections 1254 (1) and 2101 (c) of Title 28, United States Code.

Statement of the Case.

This is set forth in the petition (at pp. 2-6) under the heading "Summary Statement of Matter Involved".

Constitutional Provision and Statutes Involved.

Amendment V to the Constitution of the United States provides, in appropriate part:

> "No person shall * * * be deprived of * * * property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Declaration of Taking Act (46 Stat. 1421; 40 U. S. C. §258a *et seq.*) provides in appropriate part:

> "In any proceeding in any court of the United States * * * for the acquisition of any land * * * just compensation shall * * * be ascertained and awarded in said proceeding and established by judgment therein * * *."

The New York Emergency Commercial Space Rent Control Law (L. 1945, ch. 3, as amd.; Uncons. L. [65 McKinney's Cons. L., part 2] §§8520 *et seq.*) provides in appropriate part:

> "§8522. Definitions * * *
>
> (e) 'Emergency rent.' The rent reserved or payable * * * on March first, nineteen hundred

forty-three, plus fifteen per centum of such rent * * *

§8524. Determination of reasonable rent by court * * *

A rent, exceeding in amount the emergency rent may * * * be fixed by arbitration or by the supreme court. The rent to be so fixed shall be a reasonable rent based on the fair rental value of the tenant's commercial space * * *

In lieu of the provisions contained elsewhere in this section * * *, the tenant and the landlord may fix a reasonable rent by written agreement * * *"

Specification of Errors Intended to Be Urged.

The courts below erred in:

1. Rendering an award that had no arithmetical basis other than a square-foot unit derived solely from four sales incapable of establishing the "market value" of the premises taken.

2. Disregarding other relevant evidence of value, namely:

a. The admitted earning power of the property;

b. The value of the property to the owner as evidenced by the owner's refusal to entertain an offer exceeding the amount of the award.

3. Refusing, because of the state emergency rent law, to consider the conceded earning power of the building or to make a finding as to its fair rental value as a factor in admeasuring the value of the fee.

ARGUMENT.

POINT I.

The four Government sales as a matter of law could not establish the "market value" of the taken property.

The courts below relied on four "sales" as establishing a unit fee value for the building of $3.50 per square foot (pp. 509-13). The building award was thus made at $2,450,000 by simple multiplication (p. 513).

One of the "sales" so relied on was not a sale at all. The "seller" and the "buyer" were two corporations owned by the same man (p. 260). The Government witness admittedly would not rely on evidence of this kind in making an appraisal (p. 261). But it was relied on below, the Court saying (p. 510):

> "* * * It is almost impossible to understand what motive was to be served by placing upon the transaction a price ruinously low."

The capital gains tax suggests itself as one obvious possible motive.

Sale No. 11, also relied on, was a sale by Metropolitan Life Insurance Company in 1945 under the compulsion of New York Insurance Law §81(7). The last paragraph of that section required life insurance companies doing business in New York to liquidate all real estate acquired in satisfaction of mortgages within five years after acquisition unless

the Insurance Superintendent gives a certificate excusing "the forced sale thereof".

In 1945 (the year World War II ended), Metropolitan liquidated a huge portfolio of real estate taken in during the depression. In Manhattan alone, it sold off twenty-four major buildings for a total price of $17,545,000. Our exhibit, an extract from Metropolitan's Annual Report (Exhibit "6", p. 402), shows that every one of the twenty-four was sold at its approximate cost or book value.

Another sale involved a building that was under an unfavorable lease to the buyer (pp. 268-9, 375-6). In such a case, the owner parts with something less than unencumbered fee value. Were a property so encumbered taken in eminent domain, the owner would receive less than fee value and the tenant would receive a sum representing the present value of his leasehold. (See pp. 262-3.) Thus, such a sale would not be evidence of unencumbered fee value; it would only show the value of an interest similarly encumbered.

Thus, only one of the four sales relied on (Sale No. 3) had any bearing on market value. One sale, as we shall show, does not establish a market. Beyond this, the building there involved was an elderly store building in a different neighborhood in no way comparable to the subject premises (pp. 217, 267, 374-5, 510).

Thus, there was ample reason for the Court to apologize for basing its building award on such sales as these, taking them into consideration "for what they are worth" (p. 509). The sales here relied on

had far less relevance than the five sales considered in *United States* v. *Toronto, etc. Navigation Co.*, 338 U. S. 396. That case involved the taking of a Great Lakes car ferry. Two of the five sales were of vessels built from the same plans, though in poorer repair than the vessel taken. Three were sales of other "similar" vessels, also in poorer repair (p. 400). But all five sales were at arm's length and free of compulsion, so far as the opinion shows. On these facts, Mr. Justice Clark said (pp. 402-3):

> "* * * the determination of value cannot be reduced to inexorable rules. Suffice to say that the balance between the public's need and the claimant's loss has been struck, in most cases, by awarding the claimant the monetary 'market value' of the property * * *
>
> At times, however, peculiar circumstances may make it impossible to determine a 'market value.' There may have been, for example, so few sales of similar property that we cannot predict with any assurance that the prices paid would have been repeated in the sale we postulate of the property taken. We then say that there is 'no market' for the property in question. * * *
>
> We agree with the Court of Claims that in this case, there was no Great Lakes 'market' in the sense discussed above. We hardly think that five sales of dissimilar vessels require a finding that any one of the varying prices would have been repeated had the *Maitland* been offered for sale. And so we are in basic agreement that other measures of value may be relevant."

We note that the absence of any finding below that the four "sales" relied on established a "market".

The only finding as to these sales is that they are so poor in relevance that the Court could use them only as a last resort "for what they are worth" (p. 509).

Thus the case falls within the rule stated above. Or, as stated by Mr. Justice Frankfurter in *Kimball Laundry Co.* v. *United States,* 338 U. S. 1:

> "If exchanges of similar property have been frequent, the inference is strong that the equivalent arrived at by the haggling of the market would probably have been offered and accepted, and it is thus that the 'market price' becomes so important a standard of reference. But when the property is of a kind seldom exchanged, it has no 'market price', and then recourse *must be had* to other means of ascertaining value, including even value to the owner * * *" (p. 6).

POINT II.

The income approach should have been taken into consideration.

At page 513, the Court below enumerates the matters given consideration in reaching its award. Earning power is not there mentioned.

Elsewhere (p. 513), the Court says

> "my valuation of the building is not at all upon an income basis".

At pages 505-7, the Court states that it disregarded capitalization of net income because, in its view, the existence of the state emergency rent law made it impossible to reach a reliable estimate. Yet, there was

uncontradicted testimony by the President of the Dry Dock Savings Bank, the President of the Prudential Savings Bank of Brooklyn, the Vice-President in charge of real estate of the Irving Trust Company of New York and the Assistant Chief Appraiser of the New York Life Insurance Company that in the year of taking, notwithstanding the existence of the emergency rent law, the prime factor in appraising improved real estate for mortgage loan purposes was "the net stabilized income that we think the property will produce over the period of our loan" (p. 336; see also pp. 354, 356, 360).

Beyond this, in *United States* v. *Improved Premises known as the Cadillac Building*, 80 F. Supp. 55, the same District Judge had made a finding of fair rental value notwithstanding the New York rent control law.* (See also *Ernst* v. *Oberferst,* 166 F. 2d 519, 523 (C. A. 2, 1948), holding that a bankruptcy court sitting in New York may itself fix a reasonable rent under the local rent law without referring the issue to the state court.)

Here, the earning power of the subject premises was established by competent testimony. Petitioner showed that the floor units of 49,000 square feet here available were rare and in high demand by mail order and chain store houses (pp. 64-5). The year of the taking, thirty named companies were in the market for such units on long-term leases (pp. 365-6). Hence, had the Government yielded possession instead of condemning on the expiry of its lease, the entire

* He there said (80 F. Supp. at 58), "It seems to me that it is my task to test the conflicting claims of the parties to this litigation in an effort to determine which of the annual rentals suggested *more nearly meets the standard of what is fair and reasonable*, treating the New York statutory formula not as a mandate binding on the federal court either in whole or in part, but rather as *one of several possible guides.*"

building could have been rented within a few months at rentals averaging $2 per square foot on long-term leases (pp. 80, 86). Thus, after allowing all normal safety factors, the long range "stabilized" rent would be not less than $1.12½ per square foot, or a net rental, after operating expenses, of 53¢ per square foot (pp. 109, 114-5, 418, 419). Capitalized at 5% for the rent and 8% for the building,* the resulting value would be $5,030,000 (p. 418).

Thus, there was a direct conflict between the value based on capitalization and the value based on the so-called "sales". At page 344, the Court said:

> "The Court: I assure you, Mr. Witness, that in this very case the testimony has been that on the capitalization basis this building is worth $5,000,000, and I assure you, Mr. Witness, that the testimony on the comparative sales method is that the building is worth $3,000,000."

This petition is made possible because the Government substantially conceded the factual basis of the owner's capitalization formula. The rents were admittedly obtainable: the Government's expert testified,

> "you have rents of $1.25, $1.50 and $1.75. Now that is true, they were that much" (p. 209).

Beyond this, the capitalization rates adopted by the Government did not differ materially from the rates used by the owner (p. 486).

But in using capitalization, the Government tried to carry water on both shoulders. On the one hand

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* The Government used 6% and 9% (Ex. DD). Substituting these factors in claimant's appraisal, the result would be $4,672,000.

(pp. 209-10, 257-8), the Government argued that the rent control law made capitalization too unreliable to be used at all. Elsewhere (pp. 230-1, 486), it argued that the rent control law made it necessary to disregard the conceded earning power of the building and use the "emergency rent" as the capitalization base.

In making both of these assumptions, the Government proceeded on a fatally wrong premise (see our motion to strike, at pp. 361-3). The Government's appraisal (Ex. DD, at p. 486) says:

> "Emergency Rent Law in the State of New York provides for rental increase of 15% over those in effect as of stabilization date. *Undoubtedly the owner by appropriate action could justify and secure such an increase.* In the following analysis the Emergency Rent of $368,000 per annum has been adopted."*

The Government's witness orally repeated this assumption (p. 245):

> "The [New York] Supreme Court will allow you $368,000 as an emergency rent."

This was a complete misunderstanding. Under Section 2(e) of the New York Commercial Rent Law (L. 1947, ch. 822), the increase of 15% was *entirely automatic.* By "appropriate action", however, the owner could obtain a larger rent upon a proper showing of a higher rental value:

> "A rent, *exceeding* in amount the emergency

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* Since the building contained 700,000 sq. ft. of rentable space (p. 513), the "emergency rent" by computation would be 52½¢ per sq. ft.

> rent, may within the limitations specified by this section, be fixed by arbitration or by the supreme court. The rent to be so fixed shall be a reasonable rent based on the fair rental value of the tenant's commercial space * * *" (*ibid.*, Sec. 4).

In *Twentieth Century Associates* v. *Waldman*, 294 N. Y. 571, this provision was cited as saving the constitutionality of the entire statutory scheme. Thacher, *J.*, said:

> "Certainly there was nothing arbitrary or unreasonable in the remedy which the Legislature applied, providing, as it did, for arbitration or judicial determination of fair and reasonable rentals in all cases. Under the provisions of section 4 of the act * * * Judicial determination of a reasonable rent was thus made available to the landlord in every case" (p. 581).

If a landlord had leased an office building for fifty years at a rent of $10,000 a year with a lease which expired shortly after the emergency rent date, and comparable buildings were renting for $100,000 a year, on the theory below, the statutory emergency rent based on the rent of fifty years ago would be controlling in a federal court condemnation, even though it was perfectly clear that the landlord could go into the New York court and obtain a very great increase in rental.

The Trial Judge, in the *Cadillac* case, met the same problem in a proper way. He says at page 363 of the present record:

> "After holding that both the Government and the claimant were wrong in their approach to the

> question I insisted upon them giving me a fair market value."*

Here, however, he solved the same problem by simply ignoring the Government's manifest mistake and giving no consideration to rental values. We maintain that this was a denial of just compensation. We further maintain that the Government's error infects the Government's appraisal. We finally maintain that the award in accepting the Government's building appraisal to the penny is similarly infected.

This Court has recently indicated that in the case of income-producing property, even the so-called market data approach is merely a means of expressing income-based values in an indirect way, since it depends on tacit assumptions as to the capitalization factors used by the buyers and sellers of other income properties. Thus in *Kimball Laundry* Mr. Justice Frankfurter says (338 U. S. at 9, 10):

> "The market value of land as a business site tends to be as high as the reasonably probable earnings of a business there situated would justify * * *. As fixed by the market, value is no more than a summary expression of forecasts that the needs and attitudes which made up demand in the past will have their counterparts in the future."

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* This was correct under the state rulings that "the presumption in favor of the 'emergency' rent is rebuttable", and this in turn "requires that an opportunity be given for a determination of the amount of the 'reasonable' rent" (*Joanette Juniors, Inc.* v. *Princeway Realty Corp.*, 272 App. Div. 420, 423). And see: *Smith* v. *Feigin*, 276 App. Div. 531, 535.

So, in Dolan,* *Court Practice in Condemnation Suits*, 31 Va. L. Rev. 9, 22, the author says:

> "The capitalization method * * * has only recently found favor with the courts, although no doubt there is no truer or more accurate index of valuation for income types of property. * * * *The capitalization method is particularly adapted to this type of property valuation, in view of the difficulty in making proper adjustments and allocations for non-conforming features when applying the comparison method.* The courts have pointed out that this method is particularly suitable where there is an absence of comparative sales."

McMichael says (*Appraising Manual*, 3rd Ed.):

> "Value may be determined by the comparison method * * *. Residences are appraised in this way * * *. Business properties are best appraised on an earning basis" (p. 83).

Mr. Dolan gives the reason:

> "The question uppermost in the minds of the owner or purchaser of an industrial or income type of property is what the property will produce in the way of income and the justified capital investment, based on such net income" (31 Va. L. Rev., at 22).

For a provocative discussion of the capitalization method and the experience of the New York courts in using it, see the opinion of Referee John Godfrey Saxe in *In re N. Y. Title & Mortgage Co.* (not officially reported), 21 N. Y. S. 2d 575, at 594-6.

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* Harry T. Dolan, Esq., trial counsel to the Government in in this case.

POINT III.

The State Emergency Rent Laws are only a part of the factual complex that would be considered on an actual sale. There is no warrant for giving them conclusive effect, as was done below in disregarding the actual earning power, capitalizing the "Emergency Rent" and using worthless sales for comparison.

We grant that the scope of appellate review in these cases is very limited. As Mr. Justice Frankfurter says concurring in *Toronto* (338 U. S. at 408):

> "Barring obviously wrong criteria, or findings baseless in proof, experience counsels empiricism in dealing with these problems."

Empiricism, we submit, is not a policy of sanctioning manifest errors or awards in eminent domain based on worthless proof to the total exclusion of other evidence of value. Certainly empiricism cannot justify a federal court in throwing up its hands and failing to award just compensation because of a state emergency rent control law.

Were the sales relied on sufficient to establish the market value of the condemned premises, this petition could not be made. Where, however, the basis for the award selected below is clearly inadequate under the pertinent decisions of this Court, and where other relevant indicia of value are disregarded because of a purely temporary state regulation never intended to affect a case of this kind, an important question of federal law is clearly presented for review.

CONCLUSION.

The decision of the Trial Court, adopted *in toto* by the Court of Appeals, presents a grave question as to the criteria affecting just compensation and the effect to be given in eminent domain to a state statute regulating rents, and thus raises a question of general and constitutional importance which should receive review at the hands of this Court.

Respectfully submitted,

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Of Counsel.

New York, N. Y., February 15, 1952.

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 629

TISHMAN REALTY & CONSTRUCTION COMPANY, INC., *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the district court on trial (R. 488-519) and on motion for new trial or rehearing (R. 636-645) are reported at 92 F. Supp. 384. The *per curiam* opinion of the court of appeals (R. 657) is reported at 193 F. 2d 180.

JURISDICTION

The judgment of the court of appeals was entered January 2, 1952 (R. 658). The petition for

a writ of certiorari was filed March 4, 1952. The jurisdiction of this court is invoked under 28 U.S.C. sec. 1254(1).

QUESTION PRESENTED

Whether the district court committed error of law in rejecting the capitalization method of valuation and determining the value of the property condemned in the light of sales of other property and other considerations, when the court was of the opinion that the income predictions by petitioner's witnesses were unreliable and unbelievable.

STATEMENT

On July 1, 1947, the United States instituted this action to condemn the fee title to premises known as 252 Seventh Avenue in the Borough of Manhattan, for use by the Veterans Administration (R. 1, 5-8). The land taken was approximately 49,000 square feet in area and was improved by a building, partly sixteen stories and partly eleven stories in height, units of which had been built for heavy manufacturing purposes at various times from 1904 to 1916 (R. 6-7, 21-22, 490-491). It was owned and occupied by a mail-order house until 1932, at which time the owner encountered financial difficulties and title was taken by Metropolitan Life Insurance Company, the mortgagee, in lieu of foreclosure (R. 22, 492). From 1932 to 1942 the property was vacant and suffered a high degree of deterioration (R. 22, 60, 95, 492).

During 1941 and 1942, the building was completely renovated for office use at a cost of more than $1,300,000.00 in preparation for use by the Government, which in February of 1942 executed a lease for a term of one year, subject to renewal for additional yearly periods, at an annual rental of $320,000.00 (R. 23, 38-39, 41-46, 96, 393-400, 404, 491-492). In August of 1945, petitioner purchased the property from Metropolitan for $2,800,000.00, a price which was approximately equal to the cost of the property to Metropolitan, but more than $500,000.00 in excess of the book value or estimated market value (R. 23-24, 248, 403-404). The property was active in the market and quick action was necessary to obtain it at Metropolitan's asking price, which the principal officer of petitioner acknowledged to be more than his opinion of fair market value (R. 137, 154, 246, 248). At the time, there was in effect in New York an emergency rent law by which the rentals of commercial and business properties, such as here involved, were controlled, but under which rentals could be automatically increased 15% above the rent in effect on the "freeze" date, or could be further increased by arbitration or court proceedings (R. 492, 505-506). See New York Laws of 1945, ch. 3, as amended, McKinneys Unconsolidated Laws, sec. 8521, *et seq.* Such was the situation in 1947 when the United States determined to acquire fee title to the premises.

> tion, which is a misnomer—there was never any arbitration in practice—they of course paid the high rents.
>
> If you would want an appraisal based on income you would not know what rents to take. You have $1 rents and 50 cent rents on the same block. There is always the possible means of averaging the two, but it really indicates nothing.

He acknowledged that in 1947 petitioner could have obtained rentals of $1.25 per square foot (R. 235) but pointed out that such rentals could only be obtained under the arbitration procedure and could not be considered the long term rent necessary to afford a basis for capitalization (R. 243-244, 298-300). The arbitration procedure was subject to much criticism because in practice, rather than having any real arbitration as to a reasonable rent, the landlord would not let a tenant into possession before agreeing to a specific rental, and the arbitrator was selected with the understanding that he would fix the rental at the agreed figure (R. 209, 211-212, 244).

Basing his opinion principally on sales which he considered comparable (R. 214, 252, 388-389), the government witness estimated the fair market value of the property taken to be $3,000,000.00, of which $550,000.00 was allocated to the land (R. 230, 487). Although being of the view that the capital-

ization method of appraisal was not then as reliable as it had previously been, he did, however, make use of the method in checking his estimate of value (R. 230, 236, 257, 387). He took as the basis for the maximum long range income an annual rental of $368,000.00, which was the same as the emergency rent, i.e., 15% more than the rent being paid by the Government, and arrived at a value substantially the same as his estimate based on sales (R. 230, 236, 486).

To rebut this opinion as to the reliability of the capitalization method in 1947, petitioner called as witnesses four officials of lending institutions (R. 335-360), who testified that in 1947 their institutions gave primary consideration to the capitalization method in appraisals (R. 336-337, 354, 356, 360). However, they were not in any serious disagreement with the government witness who had testified that even in 1947 he would use the capitalization method in the event of an outstanding long term lease with a reliable tenant (R. 252-253, 257). They stated that they would rely upon capitalization only when there was a "stabilized" income (R. 336, 356-359, 360), and in the event of any great discrepancy with value established by comparable sales, they would conclude that something was wrong with the estimated net income (R. 339-340, 355) and would give great consideration to the sales (R. 345). These witnesses testified only as to use of the capitalization method in

general and were not asked to value the property taken.

At the conclusion of the trial, the court viewed not only the condemned property and the immediate area, but also the properties referred to as comparable (R. 489, 496, 568), and found that just compensation should be in the amount of $3,090,000.00 ($640,000.00 for the land and $2,450,000.00 for the building), the award for the building being exactly the same as the valuation placed on it by the government witness (R. 487, 518). In an exhaustive opinion (R. 488-519), the court explained its reasoning leading to the award and expressed agreement with the bases and reasoning of the government witness at every material point where there was a difference of opinion, especially as to the poor potentialities of the area (R. 496-499), the demand for small units, rather than units as large as 49,000 square feet (R. 498, 508), the unfairness of the arbitration procedure of fixing rentals (R. 505-506), and the impossibility of making accurate long range estimates of rental income (R. 506-507). In view of these factors the court found "no reason to suppose that normal economic pressure will operate to force rental values to the levels suggested by the claimant" (R. 508) and concluded that "regardless of its merits in other cases, the capitalization method is simply too hazardous and too uncertain" in this particular case (R. 507, 514). Consequently, in

determining the amount of just compensation the court rejected petitioner's appraisals based upon the capitalization method (R. 513, 514). It based its award, not on any one abstraction or method of valuation, but on a consideration of "the physical characteristics of the property, the peculiarities of the area in which it is located, the teachings of the history of property in that area and adjacent areas, my own inspection of the building and of comparable properties, sales which were brought forward on the theory that they involved equivalent buildings, and every bit of information that seemed relevant" (R. 513, 644).

Petitioner filed a motion for new trial or rehearing (R. 536-546), offering new evidentiary matter. This motion was denied, the court explaining in a lengthy opinion (R. 636-645) that none of the new matter would have caused any change in the conclusions as to value (R. 644-645). On January 2, 1952, the court of appeals affirmed the judgment on the basis of the opinions of the district court (R. 657-658).

ARGUMENT

1. It may be conceded that the four sales relied upon by the district court in determining the amount of just compensation do not establish a market "price" for the condemned property. "But that does not put out of hand the bearing which the scattered sales may have on what an ordinary purchaser would have paid for the claimant's

property. We simply must be wary that we give these sparse sales less weight than we accord 'market' price, and take into consideration those special circumstances in other sales which would not have affected our hypothetical buyer." *United States* v. *Toronto Nav. Co.*, 338 U.S. 396, 402. The record in this case makes it plain that the district court did not give any undue weight to the sales in the determination of value. They were merely considered along with the other evidence which the court deemed to be relevant (R. 509-514, 643-644). Obviously, there was no error in this respect.

2. Petitioner contends (Pet. 13, 17-24) that the district court erred in refusing to adopt the capitalization method of determining value. Plainly, this contention lacks merit. In the abstract, the capitalization of net income may be an acceptable means of determining the value of income producing property. But this can only be so when the evidence establishes adequate bases for the use of the process. This is not such a case. The district court found, and the record amply supports the findings, not only that the emergency rent law had made it nearly impossible to make accurate long range estimates of income (R. 506), but also that, even without the impact of the emergency rent law, it was impossible to believe that the property here involved could be rented at the prices suggested by petitioner's witnesses (R. 508-509,

514).[2] It being impossible to make any finding as to fair rental value on the evidence before it, the district court was amply justified in rejecting the capitalization method of valuation, and would have been in error otherwise. *Westchester County Park Commission* v. *United States,* 143 F. 2d 688, 693 (C.A. 2), certiorari denied, 323 U.S. 726; cf. *United States* v. *Toronto Nav. Co.,* 338 U.S. 396, 406.

3. The district court carefully weighed all the evidence introduced at the trial and, after such consideration, eliminated that which it deemed of no probative value and based its award on the evidence which it deemed relevant. Plainly, the court of appeals properly affirmed such award. The case presents no conflict and no important question which has not been adequately resolved by this Court. In the last analysis, the petition merely seeks a reweighing of the evidence and a different determination as to relative probative values. This presents nothing for this Court to review.

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[2] Pointing out that "many closely adjacent properties . . . remain blighted" the court said: "It is not reasonable to suppose that this shy behaviour of capital would occur if it were possible for Tishman to purchase a building in 1945 for $2,800,000 and to demonstrate that in 1947 its sound value for investment purposes is $5,030,000." (R. 507).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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At the trial to determine just compensation for the taking, the expert opinions as to value covered a wide range. Witnesses for petitioner estimated that the market value was in the neighborhood of $5,000,000.00, of which $1,000,000.00 was allocated to the land (R. 115-116, 411, 438). Considering that the building was ideally situated in close proximity to some of the largest industrial centers in New York City (R. 412-413, 437-438), they assumed that the building could be readily rented in units of entire floors with the owner to operate, and estimated that the average rental over a period of from 20 to 30 years would be $775,000.00 per annum, or approximately $1.13 per square foot (R. 80, 85-86, 109-110, 132, 418-419, 438-439). In arriving at this average rental, they assumed that in 1947, and for some years thereafter, rentals as high as $2.00 per square foot could be obtained through the arbitration procedure under the emergency rent law (R. 80, 85-87, 109, 128, 131-132). Their estimates as to the market value of the fee were reached solely by capitalizing the estimated net income (R. 418-422, 439-440).

The principal government witness disagreed with each of the basic assumptions advanced by petitioner's witnesses. In his opinion, the proximity of the ladies' garment district and fur district would have no effect on the rentability or value of the building because of the custom in the various industries of confining themselves within

closely defined areas (R. 197-199, 202-205, 250-251). He considered that the immediate neighborhood was nondescript and blighted, a condition which only complete rehabilitation could cure (R. 197, 204-205), and that the rental demand would be for small units, the providing of which would result in considerable loss of rental space (R. 207-208, 272).

He felt that capitalization of rental income, normally the best indicator of value of commercial properties, was of secondary importance in 1947 because of a lack of stability in rentals and maintenance costs (R. 208-210, 252-260, 290-291, 299-300, 388-389). As to the stability of rents, he testified (R. 209):[1]

> * * * I believe the capitalization of income would be purely secondary today because you have not the stability of rents, you have rents of $1.25, $1.50 and $1.75. Now that is true, they were that much. Now I have rents, your Honor, on the same block at 45 cents, 58 cents and 60 cents—people who were willing to sit tight and take advantage of the rent laws, they paid the lower rents.
>
> The people who needed space very badly and were compelled to resort to so-called arbitra-

[1] This testimony is quoted in full because in the Petition (Pet. 4, 19) it is partially quoted as evidence of a concession that the rental potential was from $1.25 to $1.75 per square foot.